IN THE MAGISTRATES' COURT OF FIJI
AT NASINU
EXTENDED CRIMINAL JURISDICTION

Magistrates' Court Criminal Case No. 142 of 2015
High Court Criminal Case No. HAC 77 of 2015

STATE

v.

1. **RAJESH KUMAR**
2. **ATISH VINOD**

For the State : Ms. Tivao, *of counsel,* for the Director of Public Prosecutions
For the 1st Defendant: Mr. N. Sharma, *of counsel* and Mr. M. Lomaloma, *of counsel,* of Nilesh Sharma Lawyers
For the 2nd Defendant: Ms. A. Erasito, *of counsel,* of Lajendra Law

---

RULING ON STAY

---

1. You each stand charged as follows:

Statement of Offence

ACTS INTENDED TO CAUSE GRIEVOUS HARM: contrary to section 255 (a) of the **CRIMES ACT 2009**

Particulars of Offence

RAJESH KUMAR and **ATISH VINOD**, on the 24th day of August 2012, at **NASINU** in the **CENTRAL DIVISION**, with intent to cause grievous harm to **ANKIT KUMAR**, unlawfully wounded the said **ANKIT KUMAR** with a kitchen knife.

2. Your criminal trial proceedings commenced in 2015. Your trial dates are fixed for 13 and 14 July 2020.

3. On 20 February 2020, you each filed a Motion for Permanent Stay of Proceedings. **RAJESH KUMAR**, you argue that you ought to be granted a permanent stay of proceedings because:

   (i) your medical report dated 25 August 2012 – which medical examination was conducted during the period you were being interviewed under caution by the police; your mug-shot; and the knife exhibit have not been disclosed to you; and

   (ii) the State had indicated on 9 May 2018 in open court that these items had existed and been exhibited but were now no longer in the care and/or possession of the State.

4. You **ATISH VINOD** argue that you ought to be granted a permanent stay of proceedings because:

   (i) the manner in which the State have prosecuted these criminal trial proceedings against you has prevented you from receiving your right to a fair trial;

   (ii) the manner in which the State have prosecuted these criminal trial proceedings against you has prevented you from receiving your right to have your trial begin and end without unreasonable delay.

5. Expanding ground 1 of your stay application, you assert the following:

   (i) you intend to raise self-defence but your requests for the disclosure of your medical report, photographs from the time you were in police custody during the initial phases of police investigations, and relevant Station Diary entries from 26 August 2012 detailing the injuries you had presented with, have gone unanswered.

6. Expanding ground 2 of your stay application, you assert the following:

   (ii) these proceedings have dragged on while your counsel attempted to obtain these crucial pieces of evidence from the State. It being the duty of the State to keep safe and disclose all material evidence in its

possession, the State is directly responsible for both the delay in getting this matter to trial and is directly responsible for depriving you of any reasonable prospect of a fair trial in all the discrete circumstances of this case.

7. Your counsel filed comprehensive affidavits and detailed submissions and I place on record my thanks to Mr. N. Sharma, *of counsel* and Mr. M. Lomaloma, *of counsel* of Nilesh Sharma Lawyers and Ms. A. Erasito, *of counsel* of Lajendra Law for their diligence and assistance to the Court.

8. The State, as Respondent, accepts the Defendants' affidavits to the extent that they accord with the Court Record and filed submissions of its own.

JURISDICTION

Arguments advanced by the parties

9. The first question to be resolved is that of jurisdiction to entertain and determine an application for permanent stay. Learned counsel for the Defendants say I have it; learned counsel for the State says I do not.

10. The crime of "***Act Intended to Cause Grievous Harm***" is an indictable one, "which shall be triable in the High Court in accordance with the provisions of the [**Criminal Procedure Act**] and upon the filing of an information": *see s. 2* and *s. 4(1)(a)* of the **Criminal Procedure Act 2009**.

11. However, "a Judge of the High Court may, be order under his or her hand and the seal of the High Court, in any particular class or classes of cases, invest a Magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the Magistrate's jurisdiction: *see s. 4 (2)* of the **Criminal Procedure Act 2009**.

12. Learned counsel for the Defendants say that the extension of that jurisdiction means that the Magistrate is now vested with the jurisdiction of the High Court. Learned counsel for the State argued that section 4 (2) of the **Criminal Procedure Act 2009** gives the Magistrate power to <u>try</u> an indictable offence, but not the power to terminate proceedings by way of an order of permanent stay.

13. It seems the State's position is that an investiture of extended jurisdiction did not broaden the Magistrates' jurisdiction at all. The argument advanced on behalf of the State is that no Magistrate possesses authority to grant stay in summary jurisdiction and all an extension of jurisdiction did was grant the Magistrate power to take an indictable matter to trial. By this I think she meant, trial in complete conformity with the rules and procedures of the Magistrates' Court and with none of the inherent powers ordinarily vested in the High Court.

14. In reply, learned counsel for the defendants' argued – sensibly - that section 4 (2) of the **Criminal Procedure Act 2009** had to be read more broadly than that. Mr. Sharma, *of counsel*, argued that "there is a clear distinction between an ordinary Magistrate sitting in (summary) jurisdiction and a Magistrate sitting in extended jurisdiction."

15. Ms. Erasito, *of counsel*, argued that when extended jurisdiction is conferred upon a Magistrate, it conferred an extension of powers beyond the ordinary; it conferred upon the Magistrate the power and authority to try the matter as if the Magistrate were sitting as the High Court and it also conferred upon the Magistrate in extended jurisdiction the power and duty to determine live controversies before it - like an application for stay of proceedings, as if it were the High Court.

Question to be Determined

16. The question to be determined is this, "is a Magistrate still a creature of statute even with extended jurisdiction, or does the conferral of extended jurisdiction confer upon the Magistrate the full powers of a High Court judge?" Just such a question, was considered in **Caniogo v. State** [2011] FJHC 711; HAA019.2011 (30 September 2011).

17. In that case counsel for the Appellant argued, a year after the **Criminal Procedure Act 2009** had entered into force of law, that the High Court had power to hear and determine appeals from the Magistrates' Court operating under the grant of extended jurisdiction. Central to his argument was the submission that "a Magistrate is still a Magistrate even with extended jurisdiction and that extended jurisdiction does not confer upon him the full powers of a High Court judge."

18. In **Caniogo's case**, in marked contrast to the position it takes here, the State had argued that the High Court had "no jurisdiction to entertain the appeal, it having come from a Court exercising the jurisdiction of the High Court." The State submitted "that any

appeal from a Magistrate exercising "extended jurisdiction" must go straight to the Court of Appeal." Despite his reservations, Madigan J. was compelled by precedent to accept the State's submissions on the matter; but not before noting that "there appear to be no cases from the Court of Appeal analysing the comparative respective jurisdictions of [the Court of Appeal and the High Court] in the case of appeals from an extended jurisdiction matter."

19. Regardless, by 2015, in **Sharma v. State** [2015] FJCA 174; AAU0012.2015 (23 December 2015), Goundar JA sitting as single judge of the Court of Appeal said:

> "[3] It is now accepted that appeals from the Magistrates' Court exercising extended jurisdiction lie with the Court of Appeal pursuant to section 21 of the of the **Court of Appeal Act, Cap. 12.**"

20. Section 21 of the **Court of Appeal Act, Cap. 12** provides for appeals from a trial in the High Court against orders of conviction, acquittal or bail. By necessary implication, a Magistrates' Court exercising extended jurisdiction is deemed to be a High Curt.

21. Learned counsel for the State cited **State v Vereti** [2013] FJMC 427; Criminal Case 08.2012 (6 August 2013) as authority for the proposition that a Magistrate has no inherent jurisdiction to determine an application for permanent stay.

22. I have carefully read that decision and extrapolate two key points. First, the principle established in **State v. Vereti** is uncontroverted. It holds to the uniquely Fijian common law position that because Magistrates' are creatures of statute, they possess no inherent powers and therefore cannot hear and determine applications for permanent stay. Second, the learned Chief Justice in **State v. Vereti**, supra was not called upon to determine the discrete issue before this Court today.

23. The defendants in that matter were charged with the crime of "***urging political violence***" contrary to section 65 (1) (b) of the **Crimes Act 2009**[1], an indictable offence triable summarily. They chose in that instance to have the matter tried summarily, in essence voluntarily submitting themselves to the summary jurisdiction of the Magistrates' Court.

---

[1] **State v. Vereti** [2013] FJHC 287; HAA024.2012 (7 June 2013).

24. The only live issue before the learned Chief Magistrate being whether a summary court had inherent jurisdiction to consider stay; it should come as no surprise to anyone that that was the only issue he determined.

25. I note that in **Boila v. State**, Criminal Miscellaneous Case No. HAM 136 of 2019 (unreported, 31 July 2019), the High Court of Fiji was called upon to determine the question of stay in respect of a case that had already been before a Magistrate under extended jurisdiction. On the face of it, that seemed a clear indication that perhaps, the grant of extended jurisdiction notwithstanding, stay applications ought to be heard in the High Court only.

26. However, a close reading of that decision points one to a different conclusion. The learned judge in that case, Perera J., is silent on the issue of the Magistrates' jurisdiction to hear and determine stay in instances where jurisdiction is extended, but he did make these firm observations:

> "First, the proceedings in the Magistrate Court in the case at hand should have been conducted on the High Court File with the High Court case number as the case is heard by the Magistrate under extended jurisdiction. That would have been a constant reminder that the case is in fact a High Court case and therefore should be given priority."

27. He also called for the immediate end to any practice that prioritised trials before the High Court in original jurisdiction over trials scheduled before the Magistrate in extended jurisdiction. He said clearly and unequivocally:

> "Given the fact that the case in question is also a High Court case and because the case was pending before the courts for 02 years when the aforementioned first application was made, the Legal Aid Commission in the first occasion and then the Office of the Director of Public Prosecution should not have made those application for adjournment based on the aforementioned reason. The relevant Resident Magistrates' should have been more restrained in entertaining the said applications."

28. Then we have these clear and unambiguous observations made by the immediate past President of the Court of Appeal, Calanchini P. in **Usa v. State** [2019] FJCA 179;

AAU81.2016 (25 September 2019) when describing the jurisdiction of the court from which the matter appealed emanated from:

> "[1] Following a trial in the Magistrates' Court at Suva exercising extended jurisdiction of the High Court the appellant was convicted on one count of aggravated robbery.
>
> [2] This is the appellant's timely application for leave to appeal against conviction pursuant to section 21 (1) (b) of the **Court of Appeal Act, 1949.**"

29. A month before that, the learned immediate past President of the Supreme Court of Fiji and Chief Justice of Fiji, Gates C.J said in **Saukelea v. State** [2019] FJSC 24; CAV0030.2018 (30 August 2019), when describing the role of the Magistrate exercising extended jurisdiction:

> "[10] The Petitioner was charged with a single count of aggravated robbery contrary to section 311 (1) (a) of the **Crimes Act 2009**...The trial took place before a Resident Magistrate exercising extended jurisdiction sitting alone as a High Court."

30. The positions taken by the High Court, Court of Appeal and Supreme Court is clear. The Magistrate sitting in extended jurisdiction exercises the jurisdiction of the High Court and sits as the High Court alone *i.e.* without assessors.

31. The point was made that the only substantive difference between the High Court and the Magistrates' Court outside of the procedural rules that govern their proceedings, lies in the fact that the High Court has inherent jurisdiction and substantially larger sentencing powers. In that context, section 4 (3) of the **Criminal Procedure Act 2009** is particularly interesting. It provides that:

> "(3) A Magistrate hearing a case in accordance with an order made under subsection (2) may not impose a sentence in excess of the sentencing powers of the Magistrate as provided for under this Act."

32. When drafting this legislation and in passing it into law, the drafters and then Parliament when it adopted it as an Act of Parliament, had access to the length and breadth of our laws. So much is clearly indicated by section 4 (3) of the **Criminal Procedure Act 2009** – a clear reference to section 6 and section 7 of the **Criminal Procedure Act 2009**.

33. It is telling, in this context, that neither the drafters of section 4 (2) of the **Criminal Procedure Act 2009** nor Parliament when enacting the **Act,** saw fit to include a further sub-section to the effect that "a Magistrate hearing a case in accordance with an order made under subsection (2) may not exercise the jurisdiction of the High Court as provided for under this Act: see section 202 of the **Criminal Procedure Act 2009.**"

Decision on the Jurisdictional Point

34. It is clear, based on the authorities before me, that the grant of extended jurisdiction confers upon the Magistrate the powers of the High Court, including its inherent power to determine live controversies like an application for permanent stay should the need arise.

35. Let me be clear:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should…With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. We have no more right to decline the exercise of the jurisdiction which is given, than to usurp that which is not given…All we can do is exercise our best judgment, and conscientiously to perform our duty."
>
> Per Chief Justice Marshall of the U.S Supreme Court in *Cohen v Virginia,* 6 Wheat 264 – 405, 5 L ed. 257 – 291.

36. I hold that if a Magistrate sits in ordinary summary jurisdiction than – subject to a sea-change in our laws, that Magistrate has no power to hear and determine an application to permanently stay criminal trial proceedings. But if a Magistrate has been granted extended jurisdiction to try an indictable offence than he or she sits as the High Court

alone *and* must exercise the jurisdiction of that court whenever the interests of justice and the merits of the case so requires.

Procedural Rules that Apply

37. Another important point that falls to be considered is which procedural rules apply.

38. The accepted position is that the Magistrate sits as a High Court alone and in that sense, he or she, in effect, conducts a bench trial in respect of that indictable matter.

39. In those circumstances, there being no assessors to worry about – it makes sound policy sense to have the defendants in these circumstances tried in accordance with the rules and procedures that govern ordinary trials in the Magistrates' Court – adopting provisions from the High Court criminal rules that best meets the interests of justice and the merits of the case where ever a lacuna exists.

40. This course of action has certainty, efficacy, and access to all the protections ordinarily available to the defendant had the matter remained in the High Court to commend it.

PERMANENT STAY

41. The next question to be determined is this, "is this a fit case for the grant of an order of permanent stay?"

42. The following is trite law:

(i) before a stay of proceedings can be considered, there must a factual basis for that consideration;

(ii) the burden of establishing the facts which might justify the intervention of a superior court of record by way of an order to permanently stay proceedings rests upon the Defendants;

(iii) further, the standard of proof is proof to the civil standard, i.e. proof on the balance of probabilities;

(iv) finally, the facts must be established by evidence which is admissible under law.

see *Takiveikata v the State* [2008] FJHC 315; HAM039.2008 (12 November 2008 at [12] per Bruce J.

43. The principles are perhaps best articulated by Perera J. in **Boila v. State**, supra as follows:

> "A permanent stay is granted under the inherent jurisdiction of the court and it is a discretionary remedy. Therefore, an applicant in a stay application should establish the necessary factual circumstances and convince the court that it is a fit and proper case for the court to exercise its discretion in order to invoke the inherent jurisdiction and grant the permanent stay sought by the applicant."

44. In **R v Taillefer & R, R v Duguay** [2003] 3 SCR 307, a decision of the Supreme Court of Canada, Cory J. said at [35]:

> "...an accused person who seeks the extraordinary remedy of a stay of proceedings must not only establish on the balance of probabilities that the right to make full answer was impaired, but must also demonstrate irreparable prejudice to that right."

45. In that same decision, the Supreme Court of Canada per Lebel J remarked:

> "[117] This Court has frequently underlined the draconian nature of a stay of proceedings, which should be ordered only in exceptional circumstances. A stay of proceedings is appropriate only "in the clearest of cases", this is "where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued"...
>
> [118] In O'Connor, supra, at para. 75, this Court adopted principles to circumscribe the power to order a stay of proceedings. These principles confirm the seriousness of such a decision and the need for a careful and balanced analysis of all the interests at stake – the interests of the accused, of course, but also the interest of the public in crime being punished and in criminal cases being diligently prosecuted. Those principles hold that a stay of proceedings will be an appropriate remedy and fair remedy where:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice."

..."

46. I also take note of the following key principles highlighted by learned counsel for the Defendants. In **Takiveikata v. State**, supra, Bruce J. observed:

> "241. The principles and standards that apply to the grant of a stay of proceedings are the same as in other contexts: a stay will only be granted in exceptional circumstances. The court must assess – if it can – the impact of the likely testimony of the missing witness and a stay may only be granted if the absence of the evidence is so prejudicial to the position of the accused that no fair trial could be held.
>
> 242. The same principles apply where a critical exhibit is lost or destroyed.....It is for the accused to demonstrate that his trial will be prejudiced by the loss or destruction of the exhibit. To that end, there must be an assessment of the likely impact of the absence of the missing exhibit."

47. In fairness and operating under the highest of ethical principles, Mr. N. Sharma, *of counsel,* referred me to the case of **Ebrahim, R (on the application of) v. Feltham Magistrates' Court & Anor** [2001] EWHC Admin 130:

> "It must be remembered that it is a commonplace in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or justices not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

48. Learned counsel also referred me to some guidelines established in that court for other courts in that jurisdiction. I am not persuaded that they are particularly apposite here. I will wait until the Court of Appeal and Supreme Courts of Fiji develop our own home-grown set of guidelines. Until that time, the common law principles are more than sufficient.

Decision on the Question of Permanent Stay

49. After considering the prejudice asserted against the evidence available, I am not satisfied that the Defendants' have suffered irremediable prejudice to their right to a fair trial.

50. While it is concerning that the Fiji Police Force has lost material evidence, the facts that each Defendant intended to prove through that evidence may be presented in other ways. In their Records of Interview for example, each Defendant asserts facts that could conceivably support the defences they intend to rely on: **Naicker v. State** [2018] FJSC 24; CAV0019.2018 (1 November 2018). I am told that the Records of Interviews will be admitted into evidence by consent and I am given to understand that in the event of a finding of case to answer, each Defendant intends to testify. More, the Defence insist on the original investigating officer being called and the State indicate they will oblige.

51. In all the circumstances, there is enough material available to permit the Defence to establish their defences at trial, *and* it is open to them to poke holes in the State's case and persuade me not to convict because evidence that might otherwise have been available was not before the court through no fault of their own.

52. All in all, I am not satisfied on the balance of probabilities that the Defendants will be denied a fair trial because of the loss of these exhibits.

53. As for the complaint of unreasonable delay –I find that while the delay was substantially caused by the State's loss of evidence, the Defendants' and their counsel contributed to that delay by not seeking a remedy until the eleventh hour, very close to when the Court was moving to fix a trial date.

54. In all the circumstances, I find that each adjournment was reasonable based on the fact that the Defendants' wanted the items found and the State needed time to find them and produce reports. If the Defendants' had truly believed they were unable to get a fair trial without that evidence, then they ought to have filed their application for stay the moment they obtained confirmation that the exhibits sought were missing.

55. I find on the balance of probabilities that these proceedings have not been unreasonably delayed.

Conclusion

56. In the result, and for the reasons set out above, the application for permanent stay is denied.

Seini K Puamau
RESIDENT MAGISTRATE

Dated at Nasinu this 13th July 2020.

MAGISTRATE'S COURT
NASINU